STATE OF MICHIGAN
IN THE SUPREME COURT

SOUTH DEARBORN ENVIRONMENTAL IMPROVEMENT ASSOCIATION, INC., DETROITERS WORKING FOR ENVIRONMENTAL JUSTICE, ORIGINAL UNITED CITIZENS OF SOUTHWEST DETROIT, and SIERRA CLUB,

Appellees,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY and DAN WYANT,

Appellants,

and

AK STEEL, INC.,

Appellant.
_____/

Supreme Court No. 154524

Court of Appeals No. 326485

Wayne County Circuit Court No. 14-00887-AA

SUPPLEMENTAL BRIEF OF APPELLANT MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Regulations

STATEMENT OF QUESTIONS PRESENTED

1. Whether MCL 324.5505(8) and MCL 324.5506(14) prescribe the applicable time period for filing a petition for judicial review of the Department of Environmental Quality's issuance of the permit that petitioners are seeking to challenge.

   Appellants' answer: No.

   Appellees' answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: No.

2. If the answer to the first question presented is no, whether the issuance of the permit that petitioners are seeking to challenge was a decision of the Department of Environmental Quality subject to the contested-case provisions of the Administrative Procedures Act, such that the time period for filing a petition for judicial review set forth in MCR 7.119(B)(1) applies, rather than the time period established by MCR 7.123(B)(1) and MCR 7.104(A).

   Appellants' answer: No.

   Appellees' answer: Yes.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Yes.

STATUTES AND RULES INVOLVED

MCL 324.5505(8)

(8) Any person may appeal the issuance or denial by the department of a permit to install, a general permit, or a permit to operate authorized in rules promulgated under subsection (6), for a new source in accordance with section 631 of the revised judicature act of 1961, 1961 PA 236, MCL 600.631. Petitions for review shall be the exclusive means to obtain judicial review of such a permit and shall be filed within 90 days after the final permit action, except that a petition may be filed after that deadline only if the petition is based solely on grounds arising after the deadline for judicial review. Such a petition shall be filed no later than 90 days after the new grounds for review arise. Appeals of permit actions for existing sources are subject to section 5506(14).

MCL 324.5506(14), in relevant part

(14) A person who owns or operates an existing source that is required to obtain an operating permit under this section, a general permit, or a permit to operate authorized under rules promulgated under section 5505(6) may file a petition with the department for review of the denial of his or her application for such a permit, the revision of any emissions limitation, standard, or condition, or a proposed revocation of his or her permit. This review shall be conducted pursuant to the contested case and judicial review procedures of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. Any person may appeal the issuance or denial of an operating permit in accordance with section 631 of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being section 600.631 of the Michigan Compiled Laws. A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action.

MCL 24.291(1)

(1) When licensing is required to be preceded by notice and an opportunity for hearing, the provisions of this act governing a contested case apply.

MCL 24.203(3), in relevant part

> (3) "Contested case" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing . . . .

MCR 7.119(A) and (B)(1)

> **(A) Scope.** This rule governs an appeal to the circuit court from an agency decision where MCL 24.201 *et seq*. applies. Unless this rule provides otherwise, MCR 7.101 through MCR 7.115 apply.
>
> **(B) Appeal of Right.**
>
> (1) *Time Requirements.* Judicial review of a final decision or order shall be by filing a claim of appeal in the circuit court within 60 days after the date of mailing of the notice of the agency's final decision or order. If a rehearing before the agency is timely requested, then the claim of appeal must be filed within 60 days after delivery or mailing of the notice of the agency's decision or order on rehearing, as provided in the statute or constitutional provision authorizing appellate review.

MCR 7.123(A) and (B)(1)

> **(A) Scope.** This rule governs an appeal to the circuit court from an agency decision that is not governed by another rule in this subchapter. Unless this rule provides otherwise, MCR 7.101 through 7.115 apply.
>
> **(B) Appeal of Right.**
>
> (1) *Time Requirements.* Time requirements are governed by MCR 7.104(A).

MCR 7.104(A), in relevant part

> **(A) Time Requirements.** The time limit for an appeal of right is jurisdictional. See MCR 7.103(A). Time is computed as provided in MCR 1.108. An appeal of right to the circuit court must be taken within:
>
> (1) 21 days or the time allowed by statute after entry of the judgment, order, or decision appealed[.]

INTRODUCTION

In granting argument on the application for leave of Appellant Michigan Department of Environmental Quality (DEQ), this Court directed the parties to address two questions that involve interpreting statutes and the Michigan Court Rules. (Ex 1.) As to the first, the Court of Appeals correctly interpreted the statutory provisions at issue, MCL 324.5505(8) and MCL 324.5506(14). The Court of Appeals, however, made a clear legal error in its interpretation of MCR 7.119(A) and Section 91(1) of the Administrative Procedures Act, MCL 24.291(1), both of which are relevant to the second question presented.

This Court should reverse the portion of the Court of Appeals' opinion of July 12, 2016 holding that MCR 7.119 governs petitioners' appeal to the circuit court and that the contested-case provisions of the APA apply to DEQ's licensing decision because it was preceded by a public hearing. (Ex 2, pp 5-7.) In arguing for reversal, DEQ provides the following answers to the Court's questions:

First, neither MCL 324.5505(8) nor MCL 324.5506(14) prescribe the applicable time period for filing a petition for judicial review of DEQ's issuance of the type of permit that petitioners seek to challenge, that is, a "permit to install" for an existing source of air pollutant emissions. MCL 324.5505(8) establishes the time period for filing a petition for judicial review of a permit to install for a "*new* source" of air pollution, *id.* (emphasis added), not a permit to install to modify an *existing* source like the steel mill in Dearborn owned by AK Steel Corporation. And although MCL 324.5506(14) establishes time periods for different categories of persons to challenge certain permits for existing sources, it does not prescribe the

time period for petitioners' challenge to the permit to install DEQ issued in this case.

Second, DEQ's issuance of the permit to install was not an agency decision subject to the contested-case provisions of the Administrative Procedures Act such that the time period in MCR 7.119(B)(1) (which governs appeals to circuit court after a contested case) would apply to the petition for judicial review petitioners filed in the circuit court. A contested case for petitioners' challenge is not authorized by statute, and they did not seek one. Petitioners' appeal is instead governed by Section 631 of the Revised Judicature Act, MCL 600.631. The time period for filing their petition for judicial review is 21 days, pursuant to MCR 7.123(B)(1) and MCR 7.104(A).

The Court of Appeals erred when it determined (1) that the contested-case provisions of the APA apply to DEQ's decision to issue the permit to install because there was notice and a public hearing prior to issuance of the permit, and (2) that the time period for petitioners' to file a petition for judicial review is 60 days under MCR 7.119(B)(1), rather than 21 days under MCR 7.123(B)(1) and MCR 7.104(A). (Ex 2, pp 5-7.) DEQ asks that this Court reverse that portion of the Court of Appeals' opinion holding that the contested-case provisions of the APA apply to licensing actions that are preceded by notice and opportunity for a public hearing. (*Id.*) In the alternative, DEQ asks this Court to peremptorily reverse that portion of the Court of Appeals' opinion and dismiss the case.

STATEMENT OF FACTS AND PROCEEDINGS

DEQ relies on the facts and proceedings as outlined in its application and includes any necessary additional facts in the body of this supplemental brief.

STANDARD OF REVIEW

The interpretation and application of statutes and court rules are questions of law that this Court reviews de novo. *Henry v Dow Chem* Co, 484 Mich 483, 495 (2009); *Morales v Auto-Owners Ins Co*, 469 Mich 487, 490 (2003). "The same legal principles that govern the construction and application of statutes apply to court rules." *People v Williams*, 483 Mich 226, 232 (2009). "When construing a court rule, we begin with its plain language; when that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation." *Id.* "Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155 (2011).

ARGUMENT

I. Neither MCL 324.5505(8) nor MCL 324.5506(14) prescribe the applicable time period for filing a petition for judicial review of DEQ's issuance of the permit that petitioners are seeking to challenge.

Petitioners are seeking to challenge a "permit to install" that DEQ issued in May 2014 for a steel mill that used to be owned and operated by Severstal Dearborn, LLC and, since September 2014, has been owned and operated by AK

Steel Corporation. (Ex 2, pp 1-2.) Among other things, permits to install authorize the installation or modification of equipment that emits air pollutants, as well as the operation of that equipment pursuant to emission limits DEQ sets to meet the requirements of Michigan's air-pollution statute, Part 55 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.5501 *et seq*. Mich Admin Code, R 336.1201. The permit to install that DEQ issued in this case authorizes the emission of air pollutants associated with changes to a blast furnace at the steel mill owned by AK Steel. (Ex 2, pp 1-2.)

The statutory provisions at issue in the Court's first question address different kinds of permits issued by DEQ under Part 55 of NREPA, including "permits to install," "operating permits," "general permits," and "permits to operate." Large facilities with many operations like AK Steel's steel mill are required to obtain a permit to install for each "process" or "process equipment" that emits air pollutants. Mich Admin Code, R 336.1201. DEQ also issues renewable operating permits pursuant to MCL 324.5506 that consolidate all of the permits to install for large facilities into one permitting document and include additional monitoring and reporting requirements. In addition, DEQ issues general permits that cover "numerous similar stationary sources or emission units." Mich Admin Code, R 336.1201a.

Further, pursuant to administrative rules issued in 1980 (Rules 201 and 208) DEQ previously issued permits to install for the initial, trial operation of equipment, as well as "permits to operate" that contain emission limits for the equipment's continued operation. (Ex 3.) In 1995, DEQ rescinded Rule 208 and stopped issuing permits to operate. Mich Admin Code, R 336.1208. Also in 1995, DEQ amended Rule 201, and the permits to install it issued subsequently include emission limits for the ongoing operation of equipment. (Ex 4.)[1]

A. MCL 324.5505(8) applies to new sources, not existing sources, and so its 90-day period does not apply to AK Steel's existing steel mill.

MCL 324.5505(8) and MCL 324.5506(14) identify different procedures and time periods for challenging different permits for "new sources" and "existing sources" of air-pollutant emissions. The time period for challenging certain permits for new sources is set forth in MCL 324.5505(8):

> (8) Any person may appeal the issuance or denial by the department of a permit to install, a general permit, or a permit to operate authorized in rules promulgated under subsection (6), for *a new source* in accordance with section 631 of the revised judicature act of 1961, 1961 PA 236, MCL 600.631. Petitions for review shall be the exclusive means to obtain judicial review of such a permit and shall be filed within 90 days after the final permit action, except that a petition may be filed after that deadline only if the petition is based solely on grounds arising after the deadline for judicial review. Such a petition

[1] Although "permits to operate" previously issued under former Rule 208 and renewable "operating permits" issued pursuant to MCL 324.5506 have similar names, they are different. DEQ began issuing renewable operating permits after MCL 324.5506 was amended in 1993 (when it was codified as MCL 336.15c) to account for changes to the federal Clean Air Act that require renewable operating permits for large emitting facilities. (Ex 5.) Renewable operating permits include monitoring and reporting requirements not contained in permits to operate.

> shall be filed no later than *90 days* after the new grounds for review arise. Appeals of permit actions for existing sources are subject to section 5506(14). [Emphasis added.]

The permit to install petitioners seek to challenge, however, authorizes changes to an *existing source*, that is, an existing blast furnace at AK Steel's steel mill. (Ex 2, pp 1-2.) The plain language of MCL 324.5505(8) therefore does not establish the applicable time period for the petition for judicial review that petitioners filed in this case.

B. MCL 324.5505(8) also does not prescribe, by its cross-reference to MCL 324.5506(14), a judicial-review time period relating to a permit to install for an existing source, as the latter statute addresses other types of permits.

The last sentence of MCL 324.5505(8) states that "[a]ppeals of permit actions for existing sources are subject to section 5506(14)." A review of MCL 324.5506(14) demonstrates that it too does not prescribe the applicable time period for petitioners' challenge, because it applies only to other types of permits (that is, to operating permits, general permits, and permits to operate), not to permits to install.

MCL 324.5506(14) states in relevant part:

> (14) A person who owns or operates an existing source that is required to obtain *an operating permit* under this section, *a general permit*, or *a permit to operate* authorized under rules promulgated under section 5505(6) may file a petition with the department for review of the denial of his or her application for such a permit, the revision of any emissions limitation, standard, or condition, or a proposed revocation of his or her permit. This review shall be conducted pursuant to the contested case and judicial review procedures of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. Any person

> may appeal the issuance or denial of an operating permit in accordance with section 631 of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being section 600.631 of the Michigan Compiled Laws. A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action. [Emphasis added.]

The first two sentences of MCL 324.5506(14) govern challenges by "a person who owns or operates an existing source[.]" If an owner or operator wants to challenge, among other things, "the revision of any emissions limitation" in a renewable operating permit, a general permit, or a permit to operate, such a challenge is initiated by filing a petition with DEQ, and the review is conducted "pursuant to the contested case and judicial review procedures of the administrative procedures act[.]" MCL 324.5506(14). Under the APA's judicial review procedures, a petition for review of a final agency decision after a contested case must be filed in the circuit court "within 60 days after the date of mailing notice of the final decision or order of the agency[.]" MCL 24.304(1).[2]

The third and fourth sentences of MCL 324.5506(14) govern challenges by someone other than an owner or operator (like petitioners in this case) to an operating permit for an existing source:

[2] If "rehearing before the agency is timely requested," the petition for review shall be filed in the circuit court "within 60 days after delivery or mailing of notice of the decision or order thereon." MCL 24.304(1).

> Any person may appeal the issuance or denial of *an operating permit* in accordance with section 631 of the revised judicature act, [MCL 600.631]. A petition for judicial review is the exclusive means of obtaining judicial review of *a permit* and shall be filed within 90 days after the final permit action. [Emphasis added.][3]

The third sentence of MCL 324.5506(14) addresses challenges to an "operating permit." One of the questions before the Court of Appeals was whether the fourth sentence, "which mentions 'a permit,' refers to the 'operating' permit from the preceding sentence or 'any' permit." (Ex 2, p 4.) The Court of Appeals ruled that, "when read in context," the fourth sentence "refers to the preceding sentence, which clarifies that the permit in question is an operating permit." (*Id.*, p 5.)

The Court of Appeals was correct. "To discern the true intent of the Legislature, [statutory provisions] must be read together, and no one section should be taken in isolation." *Aspey v Memorial Hospital*, 477 Mich 120, 133 n 8 (2007). "Whenever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory." *Id.*, 477 Mich at 127.

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[3] MCL 600.631 states:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court.

Applying these principles of statutory interpretation to the third and fourth sentences of MCL 324.5506(14), it is clear they prescribe the time period for persons other than a facility owner or operator to file a petition for judicial review to challenge an operating permit that DEQ issued for an existing source. The third sentence identifies the type of permit that a person other than an owner or operator may appeal: "an operating permit." It also provides that such an appeal is to be brought under Section 631 of the Revised Judicature Act. The fourth sentence then identifies the specific pleading and time period for that appeal: filing a petition for judicial review within 90 days after DEQ's final permit action.

Thus, the Legislature established two different time periods and two different methods for seeking judicial review of an operating permit for an existing source that depend on whether review is sought by an owner or operator of a facility or someone else. An owner or operator must first request a contested case and then seek judicial review by filing a petition for review within 60 days of DEQ's decision. By contrast, a party other than an owner or operator does not have an opportunity for a contested case; direct judicial review to the circuit court under Section 631 of the Revised Judicature Act is the "exclusive means of obtaining judicial review." MCL 324.5506(14). And they must file a petition for judicial review within 90 days of DEQ's permitting decision. Interpreting "a permit" in the fourth sentence of MCL 324.5506(14) to relate back to "an operating permit" in the third sentence effectuates that clear legislative intent.

Petitioners maintain that "a permit" in the fourth sentence of MCL 324.5506(14) means "any permit" and that the fourth sentence should be interpreted as: "A petition for judicial review is the exclusive means of obtaining judicial review of *[any] permit* and shall be filed within 90 days after the final permit action." A critical flaw in petitioners' interpretation is that it negates the 60-day time period the Legislature established in the second sentence for owners and operators to seek judicial review. Petitioners' reading is thus contrary to a key principle of statutory interpretation: that each statutory provision should be given meaning, and no part of a statute should be treated as surplusage or made nugatory. *State Farm Fire and Casualty Co v Old Republic Ins Co*, 466 Mich 142, 146 (2002).

Petitioners' reading also impermissibly eliminates the limitation in MCL 324.5506(14) on the types of permits for which appeals are available pursuant to that provision: operating permits, general permits, and permits to operate. As the Court of Appeals emphasized, if petitioners' interpretation that "a permit" means "any permit" was correct, "then there would be no need to have any discussion related to other avenues for appeal as this provision would apply to the appeal of any and all permits." (Ex 2, pp 4-5.) "This is contrary to our long-established rules of statutory interpretation, where we seek to avoid an interpretation that would render any part of the statute surplusage or nugatory." (*Id.*)

Finally, petitioners' interpretation must also be rejected because it severs the link between the third sentence of MCL 324.5506(14) (which establishes that a person other than an owner or operator may appeal an operating permit under Section 631 of the Revised Judicature Act) and the fourth sentence (which establishes that such appeal is to be initiated by filing a petition for judicial review within 90 days after DEQ's final permit action). *Sanchick v Michigan State Bd of Optometry*, 342 Mich 555, 559 (1955) (in seeking the meaning of a statute, "words and clauses will not be divorced from those which precede and those which follow.").

In sum, and in answer to the Court's first question, neither MCL 324.5505(8) nor MCL 324.5506(14) prescribe the applicable time period for filing a petition for judicial review of the permit petitioners are seeking to challenge.

II. Issuance of the permit to install was not a decision of DEQ subject to the contested-case provisions of the Administrative Procedures Act, and the time period for petitioners to file their petition for judicial review is the time period established by MCR 7.123(B)(1) and MCR 7.104(A), not MCR 7.119(B).

MCR 7.119(A) states in relevant part: "This rule governs an appeal to the circuit court from an agency decision where MCL 24.201 *et seq.* [the Administrative Procedures Act] applies." The APA applies to agency licensing decisions that are made after an evidentiary hearing, that is, after a contested case.

Section 91(1) of the APA states: "When licensing is required to be preceded by notice and an opportunity for hearing, the provision of this act governing a contested case apply." MCL 24.291(1). The APA defines a "contested case" as "a proceeding . . . including licensing . . . in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3). The APA's provisions governing a contested case include procedures for witnesses and exhibits to be presented before an administrative law judge. MCL 24.271 *et seq*.

Here, petitioners' appeal to the circuit court from DEQ's decision to issue the permit to install is *not* an appeal of an agency decision where the APA applies. As discussed previously, MCL 324.5506(14) does not provide petitioners an opportunity for a contested case; petitioners did not request one, and DEQ's decision to issue the permit to install was not made after a contested case. Because petitioners are not appealing an agency decision made after a contested case, MCR 7.119 does not apply to their appeal to the circuit court. The time period for petitioners to file their petition for judicial review is therefore not the time period in MCR 7.119(B)(1).

In cases like this one, where there was no contested case before the agency's licensing decision, judicial review is available pursuant to Section 631 of the Revised Judicature Act, MCL 600.631. (See Ex 2, p 5.) ("The parties correctly acknowledge that if the NREPA does not provide for a means for petitioners to appeal DEQ's issuance of [the permit to install], then MCL 600.631 of the Revised Judicature Act, MCL 600.101 *et seq*., applies.") And the court rule that governs

appeals under Section 631 of the RJA is MCR 7.123. That rule states that it "governs an appeal to the circuit court from an agency decision that is not governed by another rule in this subchapter." MCR 7.123(A). Under MCR 7.123(B)(1), the time requirements for such appeals are governed by MCR 7.104(A). That court rule states that an appeal "to the circuit court must be taken" within "21 days or the time allowed by statute after entry of the judgment, order, or decision appealed[.]"

In this case, there is no "time allowed by statute" for petitioners' appeal. Section 631 of the RJA provides that appeals made thereunder "shall be made in accordance with the rules of the supreme court." MCL 600.631. Petitioners therefore were required to file their petition for judicial review in the circuit court within 21 days after DEQ issued the permit to install, as required by MCR 7.123(B)(1) and MCR 7.104(A)(1). Petitioners filed their petition for judicial review 59 days after DEQ's decision to issue the permit to install. Petitioners' appeal should therefore be dismissed.

CONCLUSION AND RELIEF REQUESTED

The Michigan Department of Environmental Quality respectfully requests that this Court grant its application for leave to appeal and reverse that portion of the Court of Appeals' opinion holding that the contested-case provisions of the Administrative Procedures Act apply to licensing actions that are preceded by notice and opportunity for a public hearing. (Ex 2, pp 5-7.) In the alternative, DEQ asks this Court to peremptorily reverse that portion of the Court of Appeals' opinion and dismiss the case.

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